committed only by police officers, (ii) offences which can be committed by any person whether a police officer or not, (e.g. disorderly conduct in a police station, section 77) and (iii) offences which can be committed only by members of the general public (e.g. unlawful possession of police equipment — section 76). The offence of desertion has been deliberately omitted from Part VII — Discipline.

Desertion, being an offence created by the new Ordinance, is clearly not a re-enacted provision for the purposes of section 12 of the Interpretation and General Clauses Ordinance, 1948. If the legislature intended that the offence of desertion should apply to special police officers, it would have been necessary to make express provision therefor in the Police Ordinance, 1952, or by the publication of additional regulations under the Essential Regulations Proclamation (Proc. No. 72). It appears that the intention of the legislature was that the offence of desertion should be confined to police officers as defined in the Police Ordinance, 1952.

I am satisfied that the charge as framed was one not known to the law and that the Court should have discharged the accused under section 173(g) of the Criminal Procedure Code, the charge being groundless.

The appeal is dismissed.

Appeal dismissed.

LEE HIN v. MOHAMED BIN ABUBAKAR

[C. A. (Thomson C.J. (F.M.), Whyatt C.J. (S) and Smith J.) July 21, 1957]

[J. B. — F.M. Civil Appeal No. 41 of 1956]

Contracts (Malay States) Ordinance, 1950, s. 74(1) — Breach of contract — Measure of damages — Whether expenditure was in contemplation of parties at time contract was made.

In this case the respondent who was the administrator of the estate of Dato Abubakar (decd.) entered into a written agreement with the appellant relating to the lease to the latter of a piece of land in Johore Bahru. At the time of the agreement the respondent had not extracted letters of administration to the estate and had not obtained the necessary leave of the Court but it was agreed that the lease should be granted when the necessary leave of the Court was obtained. It was also agreed that the appellant was to have vacant possession of the land from date of agreement and that he was to erect houses on the land. The respondent did not apply to Court for leave and the appellant therefore claimed damages for breach of contract. The appellant claimed *inter alia* compensation for expenditure incurred in building operations on the land.

Held: (Thomson C.J. and Smith J., Whyatt C.J. (S) dissenting): it was in the contemplation of the parties at the time the agreement was made that the appellant would begin building operations on the land and therefore the appellant was entitled to compensation for so much of the expenditure on the land as had been incurred by the appellant.

Cases referred to:—

(1) *Day v. Singleton* (1899) 2 Ch. 320.
(2) *Braybrooks v. Whaley* (1919) 1 K.B. 435.
(3) *Hanslip v. Padwick* 5 Ex. 615.
(4) *Hodges v. Earl of Litchfield* 1 Bing. (N.C.) 492.
(5) *Flureau v. Thornhill* 2 W. Bl. 1078.
(6) *Bain v. Fothergill* (1874) L.R. 7 H.L. 158.
(7) *Engel v. Fitch* (1868) L.R. 3 Q.B. 314; L.R. 4 Q.B. 659.
(8) *Ranchhod Bhawan v. Manmohandas Ramji* I.L.R. 32 Bom. 165.
(9) *Vyramuthu v. State of Selangor* 4 F.M.S.-L.R. 277.
(10) *Syed Ahmad Alhabshee v. Puteh binti Sabtu* 5 F.M.S.L.R. 243.
(11) *Lim Yew Soon & Anor. v. Gan Chye Neo* 2 F.M.S.L.R. 5.
(12) *Hadley v. Baxendale* (1854) 96 R.R. 742.
(13) *Daniel v. Vassall* (1917) 2 Ch. 45.
(14) *Worthington v. Warrington* 137 E.R. 459; 8 C.B. 134.
(15) *Godwin v. Francis* L.R. 5 C.P. 295.

COURT OF APPEAL.

Chong Thutt Pitt for the appellant.

Omar Salleh for the respondent.

Cur. Adv. Vult.

Thomson C.J. : — This appeal concerns the quantum of damages to which the appellant is entitled on account of an undoubted breach on the part of the respondent of a contract between the parties.

On 1st June, 1954 the respondent, who is the administrator of the estate of one Dato Abubakar bin Buang (deceased) entered into a written agreement with the appellant relating to a piece of land in the town of Johore Bahru forming part of the estate in question. At the time of the agreement, according to his own evidence, the respondent had already applied for and been granted letters of administration to the estate of the deceased, though it is common ground that the grant was not extracted until 11th July, 1954, some six weeks later.

The agreement is by no means clearly drafted, but it is not in dispute that in consideration of a sum of $375, which was in fact paid to him by the appellant, the respondent agreed to grant him a lease of the land for fifty years from the 1st June, 1954, when he had obtained the necessary leave of the Court under section

83 (iii) (a) of the Probate and Administration Enactment of the State of Johore. The agreement also provided that the appellant was to have vacant possession of the land as from 1st June, 1954, and contained a clause in the following terms:—

"The lessee is to erect houses or shop-houses or bungalows or make use of the said land for any other purpose they (sic) like."

After the agreement had been made, the appellant had plans prepared by an Architect at a cost of $1,800 for building on the land and on 18th October, 1954 these plans were submitted for approval to the Johore Town Council, having been signed by the owner of the land in accordance with local building regulations.

Some time later, the appellant started to make preparations on the land for building on it and in this connection claimed to have spent $3,000.

In the meantime, the respondent would appear to have repented of his bargain, and he tried to persuade the appellant to buy the land outright for a sum of about $9,000 which was later increased to $10,500.

Ultimately, on 29th May, 1955, the respondent's solicitor wrote a letter to the appellant claiming that the agreement of 1st June, 1954 was void, because the necessary permission of the Court for a lease had not been obtained, and requiring him to cease occupation of the land. After some further correspondence the respondent's solicitor wrote a further letter (on 24th July, 1955) requiring the appellant to demolish a labourers' shed which he had built on the land and to give vacant possession within three days.

Eventually, the appellant commenced the present proceedings on 13th August, 1955. He claimed specific performance of the agreement of 1st June, 1954, a claim which was never very strongly pursued and was in fact ultimately abandoned. In the alternative he claimed $5,191.95 damages. Of the amount thus claimed, $375 was in respect of the original purchase money which he had paid to the respondent and $1,860 was in respect of preparation and filing of the Architect's plans which were filed with the Town Council on 18th October, 1954. The balance of the claim was in respect of the expenditure he alleged he had incurred in connection with preparing for building on the land.

The learned trial Judge found that the respondent was in breach of the contract of 1st June, 1954 and awarded the appellant damages which he assessed at the sum of $375 (the amount of the purchase money). Against that judgment the respondent has not appealed, but the appellant has appealed on the ground that the damages are inadequate.

Strictly speaking, it is not necessary to discuss here the question of liability or non-liability on the part of the respondent, because the trial Judge's finding on the point has not been questioned. It will, however, be advisable to say a few words on the subject, because of the bearing that the true nature of the respondent's obligation has on the question of the compensation which should be given in respect of his breach of it.

When the contract was made on 1st June, 1954, and this was clearly within the knowledge of the parties, the respondent was not in a position to grant the appellant a fifty-years lease of the land. He would not be in a position to do so until he had done two things. The first of these was formally to extract the grant of letters of administration which had already been made to him, and the second was to obtain the permission of the Court which was necessary by reason of section 83 (iii) (a) of the Probate and Administration Enactment of the State of Johore. With regard to the first of these things, the respondent extracted the grant on 11th July, 1954. With regard to the second of these things, he took no steps whatever to obtain the permission of the Court.

The matter was thus dealt with by the trial Judge:—

"Ex: PI is a simple contract whereby for a consideration of $375 paid to him, the defendant bound himself personally to take certain action for the benefit of the Plaintiff on the happening of a certain event i.e. to grant him a lease as soon as he himself was in a position to grant it. That a second event (the obtaining of the permission of the Court) must also happen must, as a matter of law, be imported into the contract by implication. The contingency expressed in the contract became a 'fait accompli' on 11th July, 1954, and it was therefore the defendant's duty, having been paid the consideration to apply to the Court for permission to grant the lease. If he had done so, and the Court had refused its permission, the contract would have become impossible of performance, but he took no steps towards carrying out his obligations under the contract and instead tried to shelter behind his want of title at the time of making it. That is entirely irrelevant; his contract was binding upon him as soon as his title was perfected. It might cease to be binding if the Court refused its consent, but it continues binding until it is ascertained that it is impossible to perform it. If the defendant breaks it before that stage is reached, then he becomes immediately liable in damages; the law excuses performance only when supervening circumstances outside the control of the obligee render it impossible."

With respect, I would express myself in agreement with the learned trial Judge in thus regarding the matter and would only add the observation that when thus regarded the facts of the case are strikingly similar to those in the well-known English case of *Day v. Singleton*[1]. That was a case where the lessee of property which he could not assign without a licence from the lessor, had agreed to sell the leasehold but had failed to do his best to procure the lessor's licence for the necessary assignment. Sir F. H. Jeune observed (at p. 332):—

"The present action is not, I think, to be regarded as an action for breach of contract to sell the lease of the hotel in question. It is really an action against Mr. Singleton for failing in his duty to obtain, if he could, the consent of the (lessor) to a transfer."

The facts are also similar to those in the case of *Braybrooks v. Whaley*[2] where a mortgagee of land had sold it but had failed to get the necessary leave of Court under the Courts (Emergency Powers) Act, 1914 and thereafter on that ground sought to cancel the sale. In both these cases it is to be noted that the aggrieved purchaser obtained damages over and above the return of what he had paid to the vendor in connection with the sale.

On the question of damages, the learned trial Judge relied on the cases of *Hanslip v. Padwick*[3] and *Hodges v. Earl of Litchfield*[4]. With great respect, I would express the opinion that neither of these cases was altogether in point, for both were cases where the vendor failed to fulfil a contract for the sale of land because of a defect in his title.

Ever since the case of *Flureau v. Thornhill*[5], which is the real source of the so-called rule in *Bain v. Fothergill*[6], it has been well-settled law in England that contracts for the sale of real estate stand on a different footing from other contracts, in that by reason of the uncertainties attached to title under the English Law when a vendor fails to fulfil his contract for the sale of land by reason of a defect in his title, all the purchaser is entitled to is the recovery of the purchase money (or deposit) and his expenses in connection with the making of the contract.

In England, however, the rule does not apply where the vendor's failure to fulfil his obligation is not due to a defect in title — see *Engel v. Fitch*[7] and *Day v. Singleton*[1], *supra*. In such cases a purchaser is entitled to recover damages in respect of the loss of his bargain.

In any event, it has been held that the rule in *Bain v. Fothergill*[6] does not apply in India. This question was dealt with by the Bombay High Court in the case of *Ranchhod Bhawan v. Manmohandas Ramji*[8], where it was held that the question of damages was governed by section 73 of the Indian Contract Act. McLeod J. said (at page 171):—

> "As Section 73 imposes no exception on the ordinary law as to damages whatever the subject matter of the contract, it seems to me that in cases of breach of contract for sale of immoveable property through inability on the vendor's part to make a good title the damages must be assessed in the usual way . . ."

The same view has been consistently taken by the Courts in this country — see *Vyramuthu v. State of Selangor*[9], *Syed Ahmad bin Mohamed Alhabshee v. Puteh binti Sabtu*[10] and in the case of *Lim Yew Soon & Another v. Gan Chye Neo*[11] the Court of Appeal of the Federated Malay States decided, on facts very similar to those of the present case, that the purchaser was entitled to damages on the principle of *Day v. Singleton*[1].

The question here then falls to be considered in the light of section 74(1) of the Contracts (Malay States) Ordinance, which reads as follows:—

> "When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."

That section reproduces the rule laid down in the well known English case of *Hadley v. Baxendale*[12].

In the present case, the damage which naturally arose from the respondent's breach was the plaintiff's loss of his bargain, the measure of which would normally be the difference between the market value and the contract price — see *Daniel v. Vassall*[13]. For some reason which is difficult to understand the appellant did not ask either on the pleadings or at the trial for general damages under which he could have claimed damages for the loss of his bargain. The failure to raise the point in the pleadings would not necessarily have been fatal — see *Daniell's* Chancery Practice, 8th ed. Vol. 2 page 1202. The whole case, however, has been conducted on the basis that all he was entitled to, if anything, was the return of the purchase money and the special damages he claimed; and it would be wrong for this Court at this stage of the proceedings to set up an entirely different case.

That the purchase money must be refunded has never been disputed.

As regards the special damages, I can see no ground for thinking that they fall within the first part of section 74(1) of the Contract (Malay States) Ordinance as arising naturally in the course of things from the respondent's breach. Nor do I know of any authority which would compel me to any such conclusion. In my opinion, however, they can fairly be said to be damages which the parties knew when they made the contract to be likely to arise from any breach of it. It is clear from the terms of the agreement that the parties contemplated that the land was to be used for building on. Indeed, nobody would contemplate a small plot of land in the Town of Johore Bahru being bought in 1954 for any other purpose. Moreover, the agreement provides for the appellant having immediate possession, which points to its being in the contemplation of the parties that the appellant should start his building operations at an early date, for, what was being given was not the whole right, title and interest in the land but only a lease for a fixed term of years, and if the land was not to be used at once there would be no point in the appellant having immediate possession.

There is no distinct authority on the point, although there are cases which might be said to point in a

contrary direction if the question of lack of title were not also involved in them — see e.g. *Worthington v. Warrington*[14].

I find, however, some support for the view I have taken in the case of *Godwin v. Francis*[15]. That was a case where the plaintiff had entered into a contract for the purchase of a piece of land which was not fulfilled by the vendor. Among other heads of damages he claimed for money which he had lost on the resale of horses bought for the purpose of stocking the land. On this particular head he failed, but the reasons for which he failed were significant. Bovill C.J. said (p. 307):—

"With respect to the last item of damages viz: that respecting the stock purchased by the plaintiff, it seems to me that this did not naturally flow from the breach of contract; it has not been shown to my satisfaction that the purchase of stock was distinctly contemplated by the parties at the time the contract was made, and I do not think, therefore, that the plaintiff was entitled to recover under this head."

Montague Smith J. said (at p. 308):—

". . . supposing nothing had passed between the plaintiff and defendant on the subject of stocking the farms, these damages would clearly have been too remote, for it could not be said to have been in the contemplation of the parties that such purchase should be made at any rate before the contract had been carried out. The correspondence relied on shows the plaintiff was about to purchase stock; but I am not at all satisfied it could be gathered from the letters that the plaintiff intended to do so before he got possession of the farms."

Finally, Brett J. said (at p. 309):—

". . . with respect to the plaintiff's loss in respect of the purchase of stock, I think the plaintiff is not entitled to recover. It was purchased before the possession of the property had been given to him or the title investigated; and I do not think the defendant was bound to expect the plaintiff would have so purchased it, or that the correspondence amounted to notice to the defendant of the plaintiff's intention to do so."

In the present case, the respondent as a reasonable man must have known that appellant intended to commence building operations at an early date, and he let him into possession. In the circumstances, the appellant is entitled to some compensation for so much of his expenditure on the land as has been thrown away. There is not, however, sufficient material on the record to show what that compensation should be. Much of his claim is in respect of building materials which may have some value, particularly as they seemed to consist of the sort of material which a building contractor moves from site to site to assist in building operations. Again, the plans for which he paid $1,800 may still have some value in relation to other building operations. And there is an item of $200 for legal expenses which cannot be allowed if it is what he paid for legal advice as to his position.

I would, therefore, allow the appeal to the extent of ordering that, in addition to the return of the purchase money, which should carry interest at 6 per cent, the appellant should have damages in respect of his loss in connection with the user of the land from 1st June, 1954 to 24th July, 1955, such damages to be ascertained by an enquiry in the usual way by the Registrar. As regards costs, the appellant should have the costs here and in the Court below, the costs in the Court below to be on the scale appropriate to the amount for which judgment is ultimately entered.

Whyatt C.J. (S.) : — This appeal raises a question as to the measure of damages for failure to complete a contract for the sale or lease of land. It has been settled law, ever since the decisions in *Engel v. Fitch*[7] and *Day v. Singleton*[1], that where failure to complete a contract for the sale or lease of land arises from the vendor's unwillingness to do what he can and ought to do in order to make a good title, the purchaser can recover the difference between the value of the property at the date of repudiation and the agreed purchase price as damages for loss of bargain. In the present case however, the plaintiff is not seeking to recover damages under this head; instead he is claiming damages in respect of expenses incurred by him after the date of the agreement in anticipation of the defendant making title to the land. Before dealing with this issue it will be convenient to summarise the relevant facts.

On the 1st June, 1954, the plaintiff and the defendant entered into a written agreement whereby the defendant agreed to grant to the plaintiff a lease for fifty years of a parcel of land at Johore Bahru for a lump sum of $375. The land was registered in the name of the defendant's deceased father and at the date of the agreement the defendant, who was the administrator of his father's estate, had not yet extracted Letters of Administration but he did so a few weeks later. The next step was for him to apply to the Court for permission to grant this lease but in fact he never took any further action to complete the matter. On the contrary, his solicitor wrote a letter to the plaintiff on the 24th July 1955 which made it plain that he repudiated the agreement. The reason for the repudiation is not entirely clear but it seems very probable that it was because of certain advice he had received from his mother since he stated in evidence in answer to the learned Judge, "I would be forced to abide by the agreement if my mother had not intervened, but after consulting my mother I realised I had made a mistake in entering into the agreement; she gave me certain advice on which I acted." But whatever the reason, the agreement was repudiated by the defendant on the 24th July 1955 and it is clear that the plaintiff thereupon became entitled to damages for loss of bargain.

The plaintiff is not, however, claiming damages for loss of bargain but is seeking, instead, to recover as

damages various sums which he spent in anticipation of the defendant making a good title to the land. This expenditure consisted of architect's fees for the plans of four houses which he intended to build on the land, the cost of loads of granite, sand and other building materials taken on to the land, the cost of erecting a bangsal, or builders' store on the site, coolie expenses, jaga wages and so forth, amounting in all to $4,816.95

The question whether this sum is recoverable depends upon whether miscellaneous items of this kind can be said to flow naturally from the breach. In the case of *Godwin v. Francis*[15] where the plaintiff claimed damages for the purchase of stock before the contract for the sale of some land was completed, Bovill C.J. said: "With respect to the last item of damages, viz., that respecting the stock purchased by the plaintiff, it seems to me that this did not naturally flow from the breach of contract; it has not been shown to my satisfaction that the purchase of stock was distinctly contemplated by the parties at the time the contract was made, and I do not think, therefore, that the plaintiff was entitled to recover under this head."

The test, therefore, to be applied in the present case is whether it was in the contemplation of the parties at the time the agreement was made that this expenditure on building operations would be incurred before the agreement was completed by the defendant making title; if it was in the contemplation of the parties, it is recoverable; if not, then the damages are too remote. It is, of course, true that this was an agreement for a building lease and clause 7 of the agreement provided that the lessee should erect houses, shops, or bungalows on the site but that is very far from saying that the parties contemplated he would start building operations before he had got a title to the land. On the contrary, there is no evidence that on the 1st June 1954 when the parties entered into this agreement, they contemplated that the purchaser would embark upon any expenditure in connection with the erection of houses or any other type of building on this site prior to the defendant making out a good title. It follows that the plaintiff was acting on his own initiative and responsibility in incurring this expenditure and therefore the loss is not one which flows naturally from the breach of the agreement. Nor does it make any difference, in my view, that after entering into the agreement on the 1st June 1954, the defendant some months later approved the plans which the plaintiff had asked an architect to prepare for the building he intended to erect on this site. The conduct, or perhaps it would be more accurate to say, the misconduct of the defendant in approving the plans between the date of the contract and the date when he repudiated it, might possibly give rise to an action in deceit but it cannot alter the effect of the contract itself. Accordingly, in my opinion, the expenditure incurred by the plaintiff in connexion with these premature building operations is too remote to be recoverable as damages for breach of the agreement of the 1st June 1954. In my view the judgment of the trial Judge should be affirmed and this appeal dismissed with costs.

Smith J. : —I have had the benefit of reading the judgments of my brother Judges. To the law therein stated I have nothing to add.

The question of fact to be decided is whether it was in the contemplation of the parties at the time when the contract was made that building operations could begin before the defendant granted the lease to the plaintiff. The agreement was entered into on 1st June, 1954, and contemplated the plaintiff going into immediate possession. Since clause 7 of the agreement provides for the erection of houses, etc., on the land it appears to me to have been in the contemplation of the parties that building operations might begin any time after 1st June, 1954. I am fortified in this belief because the defendant at a later date assisted the plaintiff in taking a necessary step towards building by signing building plans before submission to the Town Council for approval, a course of action consistent with an original intention to permit building forthwith.

I therefore find myself in agreement with the learned Chief Justice of the Federation and would allow the appeal to the extent appearing in his judgment with costs for the appellant as therein proposed.

Appeal allowed.

Solicitors: *Chong Thutt Pitt & Co.; M. Ismail.*

WONG THIN v. PUBLIC PROSECUTOR

[A. Cr. J. (Smith J.) October 17, 1957]

[K. L.—Criminal Appeal No. 30 of 1957]

Societies Ordinance, 1949, ss. 14(1) & 15(2)—"Insignia"—Tattoo marks not "insignia"—Presumption—Accused's explanation.

A tattoo mark on a person's body does not constitute an "insignia" within the meaning of section 14(1) of the Societies Ordinance, 1949. The word "insignia" must be read *ejusdem generis* with the words "books, accounts, writings, lists of members, seals, banners," etc. which are things clearly capable of being physically transferred.

Nevertheless, a tattoo mark applicable to a secret society on a person's body raises a presumption under section 114 of the Evidence Ordinance that he is a member of such a society. However, on an explanation that raises a reasonable doubt in the mind of a Magistrate an accused person is entitled to be acquitted. It is not necessary that the Court should be convinced of the truth of the explanation.